RINOL MALAYSIA SDN BHD

v.

MFRP MARKETING SDN BHD

HIGH COURT MALAYA, SHAH ALAM
ZALEHA ZAHARI J
[ORIGINATING SUMMONS NO: MT3-24-1535-2002]
20 AUGUST 2003

COMPANY LAW: *Winding-up - Petition - Application by plaintiff company to restrain defendant from filing winding-up petition against it - Plaintiff disputed sum claimed in petition - Whether sum claimed need not be proved by defendant before filing of petition - Whether plaintiff could contest petition at hearing thereof - Whether plaintiff to prove that intended petition would prima facie fail - Proof of plaintiff's solvency - Whether premature for court to consider at this stage - Whether application was interlocutory and should be discouraged*

The plaintiff company applied by way of an originating summons ('the application') for an order to restrain the defendant from presenting a winding-up petition against the plaintiff or if the said petition was already filed, the further prosecution of it. The defendant alleged that the plaintiff owed the defendant a sum of RM823,140 for goods supplied by the defendant to the plaintiff. The plaintiff disputed the sum owed and submitted that the winding-up petition was an illegitimate means of enforcing payment of the disputed debt. It was also submitted that the defendant must prove the sum owed. Further, the plaintiff produced audited accounts to prove its solvency and that therefore it should not be wound-up.

Held:

[1] The defendant would be precluded from filing the intended winding-up petition should this court allow the plaintiff's application. Alternatively, if the court were to dismiss the application, although the defendant would be free to present a winding-up petition against the plaintiff, the plaintiff could still contest the winding-up petition and show cause before the winding-up court why it should not be wound up. The decision of this court although final in respect of the issue in the application, was interlocutory in effect in respect of the alleged indebtedness. In the circumstances, it was not incumbent upon the defendant to satisfy the court in these proceedings that the said sum was in fact due and owing

by the plaintiff to the defendant. On the contrary, it was incumbent upon the plaintiff to not merely raise a serious question to be tried but also prove a *prima facie* case that the intended petition was bound to fail. (pp 148 h & 149 a-c)

[1a] The plaintiff failed to discharge the burden of proving that the intended winding-up petition *prima facie* was bound to fail. On the other hand, the defendant had presented sufficient evidence of an unsatisfied debt as well as a real risk of the plaintiff dissipating its assets that would put it out of the defendant's reach. (p 150 d-f)

[2] The solvency of the plaintiff was a matter to be properly considered at the hearing of the winding-up petition. It was premature for the court to consider the said matter at this stage. (p 151 e)

[3] The application would run contrary to the Court of Appeal's decision in *Maril Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers & Other Appeals* of discouraging multiplicity of interlocutory applications in a winding-up matter. (p 152 a)

[4] The defendant should not be prevented from presenting the said petition against the plaintiff and it was up to the winding-up court to consider all of the evidence presented before it and determine whether it should exercise its discretion to order a winding-up of the plaintiff or otherwise. (p 152 b)

[Plaintiff's application dismissed with costs.]

Case(s) referred to:

American Cynamid [1975] AC 396 ***(refd)***

Braynston Ltd v. De Vries (No 2) [1976] 1 All ER 25 ***(refd)***

Chip Yew Brick Fireworks Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Malayan Banking Bhd v. Red Box (M) Sdn Bhd [2000] 6 CLJ 21 HC ***(refd)***

Malayan Flour Mill Bhd v. Raja Lope and Tan Co [2000] 7 CLJ 288 HC ***(refd)***

Maril Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers & Other Appeals [2001] 3 CLJ 248 CA ***(foll)***

Metal Reclamation (Ind) Sdn Bhd v. JRC Tenaga Sdn Bhd [2000] 6 CLJ 290 HC ***(refd)***

Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 SC ***(refd)***
Natseven TV Sdn Bhd v. Television New Zealand Ltd [2001] 4 AMR 4648 ***(refd)***
Rinol Malaysia v. MBT (Malaysia) [2002] 6 CLJ 63 HC
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC

Legislation referred to:
Companies Act 1965, ss. 218, 280(2)(a)

For the plaintiff - Govin Sreedharan; M/s Choong & Co
For the defendant - N Chandran (Ranjan Chandran & S Dhanaraj); M/s Hakem Arabi & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Zaleha Zahari J:
By originating summons filed on 22 June 2002 Rinol Malaysia Sdn Bhd (the "plaintiff company") sought for an order to restrain MFRP Marketing Sdn Bhd ("the defendant") from presenting a petition to wind-up against the plaintif company, or if already filed, the further prosecution of the petition.

An interim order was issued by the court on 26 June 2002 and on 16 July 2002, by agreement of parties, the interim order was extended until final disposal of this originating summons.

Background
The affidavits filed in support and in opposition to this application reveals the following facts and areas of contention.

The plaintiff company in this case is disputing that they owed the defendant the sum of RM823,140 allegedly for goods supplied by the defendant to them. The evidence before the court of the contractual relationship between the plaintiff company and the defendant are as follows:

The court had before it three purchase orders issued by the plaintiff company dated 10 December 2001, and a fourth dated 22 February 2002 (hereinafter referred to as "the said purchase orders"), as well as Delivery Notes Issued by the defendant dated 15 January 2002, 22 January 2002, 30 January 2002 and 11 March 2002 respectively duly acknowledged by the plaintiff company in respect of the goods stipulated in the said purchase orders. Thereafter the defendant issued invoices for payment for the goods supplied within the contractual period of 14 days as follows:

(a) Invoice No. 04576 dated 15 January 2002, the sum of RM292,400;

(b) Invoice No. 04603 dated 22 January 2002, the sum of RM105,740;

(c) Invoice No.04630 dated 30 January 2002, the sum of RM170,000;

(d) Invoice No. 04677 dated 26 April 2002, the sum of RM292,400; and

(e) Invoice No. 04709 dated 10 May 2002, the sum of RM85,000.

(Exhibit MFRP1, MFRP2 and MFRP3 encl. (13)),

Arising from the plaintiff company's failure to settle the total amount of RM823,140 invoiced (hereinafter referred to as "the said sum") within the specified time frame, on 7 June 2002, the defendant, through their solicitors Messrs Hakem Arabi & Associates, issued the plaintiff company a s. 280(2)(a) Companies Act 1965 notice (exh. "SY1", encl. (2)) demanding that the plaintiff company do pay the said sum within 21 days of service of the said notice failing which winding-up proceedings would be instituted against them.

The plaintiff company's response to this notice made through their solicitors, Messrs Choong & Co. *vide* letter dated 18 June 2002 (exh. "SYT3" encl. (2)), was to deny that they owed the defendant the said sum. A few days later, on 22 June 2002, the plaintiff company filed this application.

The Plaintiff's Case

The plaintiff company's counsel submitted that a winding-up petition is not a legitimate means of seeking to enforce payment of a disputed debt. It was contended that the true purpose of the filing of a winding-up petition against the plaintiff company was to pressure and induce the plaintiff to pay a sum which is not in fact due and owing. The act of filing and advertisement of such a petition would itself cause irreparable damage to the plaintiff company's reputation and business.

It was further averred that the plaintiff was a successful and profitable company. The Rinol Group of companies was spread out worldwide and were market leaders involved in the business of floor laying with their ultimate holding company being listed on the Frankfurt Stock Exchange (11 encl. (2)).

Evidence was presented before the court of the plaintiff company's solvency. Audited accounts dated 15 March 2002 for year ending 31 December 2001 (para. 4 of encl. (4) exh. "SYT4") reveals that the plaintiff company's current assets stood at RM14,167,115, whilst liabilities stood at RM11,388,544. According to these accounts there was a surplus of RM2,778,514, which

amount was more than sufficient to meet the said sum which is being claimed by the defendant. In para. 5 of the same affidavit the plaintiff further averred that, as at the date of the averment of the affidavit (ie 24 June 2002), the current assets of the plaintiff company stood at about RM1.2 million.

The plaintiff company, *vide* Siah Yang Kit @ Siah Yang Tit affidavit affirmed on 8 November 2002 (encl. (9)), took issue with the averments of their former Managing Director, Then Liat Nyap @ David Then's affidavit averred on 30 September 2002 which was filed by the defendant in opposition to this application. According to plaintiff Then Liat Nyap @ David Then's affidavit was not made *bona fide* but was tainted by malice and bias. Pending civil suits currently pending between the plaintiff company and their former Managing Director and another (ie, MT1-22-522-2002) as well as another civil suit (ie, MT5-22-645-2002) between Rinol Asia Pte Ltd. against David Then and 2 others (exhs. "SYT6" and "SYT7" encl. (9)) were held out as evidence in support of the alleged bad faith.

The plaintiff company also took the position that it was incumbent upon the defendant to prove that the said sum was in fact due and owing by the plaintiff (para. 8 encl. (2)). The plaintiff company's contention was that documentary evidence presented before the court was insufficient to substantiate the said sum demanded by the defendant.

Counsel for the plaintiff submitted that by reason of the fact that the defendant had not obtained any judgment, nor filed any suit in respect of the said sum, a winding-up petition cannot be resorted to settle disputed debts. The proper course of action (even if the defendant had a wholly justified claim against the plaintiff's company) was for the defendant to file a civil suit in the first instance, prove their claim and obtain a judgment before the defendant is entitled to payment. The plaintiff company also averred that it was itself contemplating legal proceedings against the defendant for damages for breach of contract which claim was likely to be higher than the alleged sum claimed by the defendant (para. 10 encl. (6)).

As to the burden of proof in an application such as this, the plaintiff's case was that, if the defendant intends to commence winding-up proceedings against the plaintiff, the burden of proof was on the defendant to establish that there is in fact a debt due and owing by the plaintiff which the defendant had failed to do. It is not for the plaintiff to prove that there is no outstanding sum due and owing by them to the defendant (para. 10 encl. (2)). This point was reiterated by the plaintiff company in para. 15 of their affidavit in encl. (6).

The plaintiff's counsel in his submission referred the court's attention to several cases before winding-up courts at the High Court level where the winding-up court have held that a winding-up petition was not a legitimate means to enforce payment of a debt which has not been clearly determined, *inter alia Metal Reclamation (Ind) Sdn Bhd v. JRC Tenaga Sdn Bhd* [2000] 6 CLJ 290. The attention of this court was also drawn to the decision of YA Dato' Zulkefli's Makinudin J in *Rinol Malaysia v. MBT (Malaysia)* [2002] 6 CLJ 63 as well as that of YA Dato' Ramly Ali JC (as His Lordship then was) in *Malayan Flour Mill Bhd. v. Raja Lope and Tan Co* [2000] 7 CLJ 288 where it was held that the filing of winding-up petition was not appropriate in respect of a disputed claim and the application for an injunction to restrain the filing of a winding-up petition against the company concerned was allowed.

The Defendant's Case

The defendant's response is that the plaintiff company is bound by the contractual terms entered into between them. The purchase orders, Delivery Notes and Invoices before the court clearly shows the plaintiff company was indebted to the defendant in the amount claimed in the s. 218 Companies Act notice. Also highlighted was the fact that the plaintiff company did not take issue with the goods supplied, nor of the amount claimed, within the time frame provided not at any time prior to the filing of this application for an injunction.

The affidavit of Then Liat Nyap @ David Then affirmed by on 20 September 2002, the Managing Director of the plaintiff at the point of time of the transaction in issue (ie, encl. (11)) confirmed that the said sum was in fact due to the defendant and not settled because of the plaintiff company's unhealthy financial position. Paragraph 8 of this affidavit also highlighted the fact that the plaintiff company's sales performance had plunged down from RM15,704,254 to about RM2,500,000 in 2002. Also stressed was the fact was that the plaintiff company had reduced its number of its employees in Malaysia, had many unsettled debts and was facing acute financial problems and that there was every probability of the plaintiff ceasing its operations in the Asian region. *Vide* encl. (13) the defendant averred that the plaintiff company had reduced its work force to a skeletal force of about 10 workers, that the plaintiff company had ceased its operations in Thailand and Hong Kong and there was every likelihood of the plaintiff company ceasing their operations in Malaysia.

The defendant's counsel submitted that had the case of *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 95 and *Maril Rionebel (M) Sdn. Bhd. & Anor v. Perdana Merchant Bankers & Other Appeals* [2001] 3 CLJ 248 been referred to the Honourable Judges in *Rinol Malaysia v. MBT (Malaysia)* [2000] 6 CLJ 63 and *Malayan Flour Mill Bhd. v. Raja Lope and Tan Co* [2000] 7 CLJ 288 their Lordships decision might well have arrived at a different conclusion.

In *Morgan Guaranty* the Supreme affirmed their earlier decision in *Chip Yew Brick Fireworks Sdn Bhd v. Chang Heer Enterprise Sdn Bhd*. [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 where it was held that, "Even where the whole amount of the debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose of ultimately determining whether it should exercise the discretion ..."

In *Maril Rionebel* the Court of Appeal had expressed their strong dissatisfaction in delay in the disposal of winding-up petitions arising from the filing of interlocutory applications upon interlocutory applications in winding-up petitions.

In these circumstances the defendant urged this court to dismiss the plaintiff's application with costs.

Findings

It would appear that the legal right which the plaintiff company relies in this application, the violation of which the plaintiff company is seeking temporary protection of, appears to be the right not to be involved in litigation which would constitute an abuse of the process of court.

The initial issue in my view for this court to determine is, on whom and what is the burden of proof in an application such as this? Was the plaintiff company right in contending that it was incumbent upon the defendant to prove that the said sum was in fact due from the plaintiff company at the hearing of this application?

In the consideration of this issue this court bore in the forefront of its mind that there clearly is a distinction between the exercise of the court's discretion at a hearing of a winding-up petition whether or not to wind-up a company as contrasted with the exercise of its discretion whether to restrain or stay the presentation of or the further prosecution of a winding-up petition.

In respect of the latter situation, this court's decision, whether to restrain or stay the presentation of or the further prosecution of a winding-up petition would clearly be final and conclusive as far as this particular issue is concerned. Be that as it may, this court's decision would not however be conclusive as far as the alleged indebtedness between the parties are concerned. The defendant would of course be precluded from filing the intended winding-up petition should this court allow the plaintiff's application. The defendant would then have to file a suit in the first instance and the matters in dispute be adjudicated upon. Alternatively, if this court were to dismiss this application, although the

defendant would be free to present a winding-up petition, it is still open to the plaintiff company to contest the winding-up petition and show cause before the winding-up court why it should not be wound up. In other words, this decision of this court, although final in respect of the issue in this application is concerned, is interlocutory in effect in respect of the alleged indebtedness.

In this circumstance I am not therefore in agreement with the plaintiff company's contention that it is incumbent upon the defendant to satisfy this court in these proceedings that the said sum is in fact due and owing by the plaintiff company to the defendant. On the contrary I hold that, in proceedings such as this, it is incumbent upon the plaintiff to not merely raise a serious question to be tried as envisaged by Lord Diplock in the *American Cynamid* [1975] AC 396, but also has the added responsibility of proving a *prima facie* case that the intended petition is bound to fail based on the following authorities.

The Court of Appeal in *Braynston Finance Ltd. v. De Vries (No 2)* [1976] 1 All ER 25 in my view should also be applied to the present case. Buckley J at p. 36 of his judgment in *Braynston Finance* states as follows:

> It has long been recognised that the jurisdiction of the court to stay an action *in limine* as an abuse of process is a jurisdiction to be exercised with great circumspection, and exactly the same considerations must apply to a *quia timet* injunction to restrain commencement of proceedings. These principles are, in my opinion, just as applicable to a winding up petition as to an action. The right to petition the court for a winding up order in appropriate circumstances is a right conferred by statute. A would-be petitioner should not be restrained from exercising it except on clear and persuasive grounds.

Further, at p. 36 of the judgment, Lord Buckley held that:

> ... the court should not, in my judgment, interfere with what would otherwise be a legitimate approach to the seat of justice unless the evidence is sufficient to establish *prima facie* that the plaintiff will succeed in establishing that the proceedings sought to be restrained will constitute an abuse of process.

Stephenson LJ at p. 37 in *Braynston Finance* was of the view that to prevent winding-up proceedings should not be decided by principles governing interlocutory injunctions as outlined in *American Cynamid*. That it ought not to rest simply on balance of convenience considerations and that something more is required. His Lordship concurred with Lord Buckley J in holding that, in proceedings to prevent the prosecution of a winding-up, the applicant must show that the proposed petition would constitute an abuse of the process of court.

In *Malayan Banking Bhd v. Red Box (M) Sdn Bhd* [2000] 6 CLJ 21 Dato' Abdul Malik Ishak J applied *Braynston Finance* when he ruled that for the purpose of obtaining an interim injunction to restrain a defendant from proceeding with a winding-up petition, the burden of proof is only discharged by reference to the standard of proof or test in adducing evidence to establish a *prima facie* case and that the principle relating to the test of "serious question to be tried" in the *American Cynamid* as applied in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 is not applicable as those applications were not applications to restrain winding-up petitions or proceedings.

Braynston Finance was also applied in *Natseven TV Sdn Bhd v. Television New Zealand Limited* [2001] 4 AMR 4648 where Low Hop Bing J held that in order to succeed in an application for injunctive relief to restrain a defendant from proceeding with a winding-up petition the standard of proof required of the plaintiff was to establish a *prima facie* case and not merely a serious question to be tried.

Has the plaintiff discharged the burden to the standard required of proving that the intended winding-up petition by the defendant *prima facie* is "bound to fail" constituting an abuse of the process of the court on the facts of this case? The phrase "bound to fail" must necessarily be construed by this court to mean that it is incumbent upon the plaintiff company to show that that it is unlikely that a winding-up would be made by any judge in the exercise of its discretion. In other words that it was plain and obvious that the winding-up petition would not succeed.

On the basis of the evidence presented before me I hold that the plaintiff had failed to discharge the onus to the standard that lies upon them. On the other hand I hold that the defendant has presented sufficient evidence before the court of an unsatisfied debt as well as a real risk of the plaintiff company dissipating their assets which would put them out of the defendant's reach.

As to the point of winding-up proceedings being inappropriate in respect of disputed debts I am not in agreement with the decision in *Rinol Malaysia* and *Malayan Flour Mill* as I am bound by the Supreme Court in *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 where it was held that:

> Even where the whole amount of the debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider the question for the purpose of ultimately determining whether it should exercise the discretion.

The Supreme Court followed *Chip Yew Brickworks* in *Morgan Guaranty Trust Co. of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 where it held:

> Looking at the grounds given in the petition in the instant case it is clear that the petition should not have been struck out in limine and should have been heard on its merits. This was the approach of this court *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd.* The Appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding-up or not. The merits of the Plaintiff's taking issue with the sum claimed by the Defendant cannot be determined at this stage and can only be determined at the hearing of the winding-up petition stage. Defendants petition should not and cannot be tried in an interlocutory application.

Insofar as the plaintiff company being solvent by production of its accounts before this court, in my judgment, this matter, if relevant at all, is a matter properly to be considered at the hearing of the winding-up petition and that it is premature for this court to consider this at this stage. On this issue the Supreme Court in *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 ruled that:

> ... the presumption of insolvency arises when the requirements of s. 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with "commercial insolvency", that is of a company being unable to meet its current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plant* case and cite the following observations from *Buckley* on Companies Act (13th Ed) at p. 460:
>
> In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound. It may have wealth locked up in investments not presently realizable; but although this may be so, yet if it has no assets available to meet its current liabilities it is commercially insolvent and may be wound up.

I am also in agreement with the submission of the defendant's counsel that to allow this application would run contrary to the Court of Appeal's decision in *Maril Rionebel* of discouraging multiplicity of interlocutory applications in a winding-up. This principle should equally be applied to encompass proceedings, which are interlocutory in effect.

On the facts and circumstances of this case I hold the defendant should not be prevented from presenting a petition against the plaintiff company, if they are minded to do so, and that it is up to the winding-up court to consider all of the evidence presented before it and determine whether it should exercise its discretion to order a winding-up of the plaintiff or otherwise.

In these circumstances the plaintiff company's application was accordingly dismissed with costs.